



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2018-0040]**

**Surface Transportation Project Delivery Program; Alaska Department of Transportation Audit Report**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice; Request for comment.

**SUMMARY:** The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years to ensure the State's compliance with program requirements. This notice announces and solicits comments on the first audit report for the Alaska Department of Transportation and Public Facilities (DOT&PF).

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590. You may also submit comments electronically at

www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

**FOR FURTHER INFORMATION CONTACT:** Mr. David T. Williams, Office of Project Development and Environmental Review, (202) 366-4074, *David.Williams@dot.gov*, or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, *Jomar.Maldonado@dot.gov*, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

## **Background**

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C.) 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities, in lieu of the FHWA. The DOT&PF published its application for NEPA assumption on May 1, 2016, and made it available for public comment for 30 days. After considering public comments, DOT&PF submitted its application to FHWA on July 12, 2016. The application served as the basis for developing a Memorandum of Understanding (MOU) that identifies the responsibilities and obligations that the DOT&PF would assume. The FHWA published a notice of the draft MOU in the Federal Register on August 25, 2017, with a 30-day comment period to solicit the views of the public and Federal Agencies. After the end of the comment period, FHWA and DOT&PF considered comments and proceeded to execute the MOU. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. This notice announces the availability of the first audit report for DOT&PF and solicits public comment on same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Issued on: August 28, 2018.

**Brandye L. Hendrickson,**  
*Deputy Administrator,*  
*Federal Highway Administration.*

**Draft FHWA Audit of the Alaska Department of Transportation**  
**April 16-20, 2018**

The Audit Team finds Alaska Department of Transportation and Public Facilities (DOT&PF) is carrying out the National Environmental Policy Act (NEPA) Assignment Program responsibilities (assumed November 2017) and is compliant with the provisions of the NEPA Assignment Program Memorandum of Understanding (MOU). The Alaska DOT&PF has established written internal policies and procedures for the assumed Federal responsibilities. Following 5 months after execution of the MOU, the Audit Team identified one non-compliance observation, seven general observations, and six successful practices. Overall, DOT&PF has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program.

### **Executive Summary**

This report summarizes the results of the Federal Highway Administration's (FHWA) first audit of the Alaska DOT&PF NEPA review responsibilities and obligations that FHWA has assigned and DOT&PF has assumed pursuant to 23 United States Code (U.S.C.) 327. Throughout this report, FHWA uses the term "NEPA Assignment Program" to refer to the program codified at 23 U.S.C. 327. Under the authority of 23 U.S.C. 327, DOT&PF and FHWA signed a MOU on November 3, 2017, to memorialize DOT&PF's NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals for transportation projects in Alaska. Except for three projects, which FHWA retained, FHWA's only NEPA responsibilities in Alaska are oversight and review of how DOT&PF executes its NEPA Assignment Program obligations. The MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EAs), environmental impact statements (EIS), and categorical exclusions (CE).

As part of its review responsibilities under 23 U.S.C. 327, FHWA formed a team in October 2017 to plan and conduct an audit of NEPA responsibilities DOT&PF assumed. Prior to the on-site visit, the Audit Team reviewed DOT&PF's NEPA project documentation, DOT&PF's response to FHWA's pre-audit information request (PAIR), and DOT&PF's self-assessment of its NEPA Program. The Audit Team reviewed additional documents and conducted interviews with DOT&PF staff in Alaska on April 16-20, 2018.

The DOT&PF entered into the NEPA Assignment Program after more than 8 years of experience making FHWA NEPA CE determinations pursuant to 23 U.S.C. 326 (beginning September 22, 2009). The DOT&PF's environmental review procedures are

compliant for CEs, and DOT&PF is implementing procedures and processes for CEs, EAs, and EISs as part of its new responsibilities under the NEPA Assignment Program. Overall, the Audit Team found that DOT&PF is successfully adding CE, EA, and EIS project review responsibilities to an already successful CE review program. The Audit Team identified one non-compliance observation, seven general observations, as well as several successful practices. The Audit Team finds DOT&PF is carrying out the responsibilities it has assumed and is in compliance with the provisions of the MOU.

## **Background**

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities DOT&PF has assumed in addition to NEPA include Section 7 consultation under the Endangered Species Act (ESA) and consultation under Section 106 of the National Historic Preservation Act (NHPA).

Following this first audit, FHWA will conduct three more annual audits to satisfy provisions of 23 U.S.C. 327(g) and Section 11 of the MOU. Audits are the primary mechanism through which FHWA may oversee DOT&PF's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating DOT&PF's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the Federal Register.

The Audit Team consisted of NEPA subject matter experts from the FHWA Alaska Division, as well as from FHWA offices in Washington, District of Columbia; Atlanta, Georgia; Sacramento, California; and Lakewood, Colorado. These experts received training on how to evaluate implementation of the NEPA Assignment Program. In addition, the FHWA Alaska Division designated their Environmental Program Manager to serve as a NEPA Assignment Program liaison to DOT&PF.

## **Scope and Methodology**

The Audit Team conducted an examination of DOT&PF's NEPA project files, DOT&PF responses to the PAIR, and DOT&PF's self-assessment. The audit also included interviews with staff and reviews of DOT&PF policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; quality assurance/quality control (QA/QC); legal sufficiency; training; and performance measurement.

The focus of the audit was on DOT&PF's individual project compliance and adherence to program practices and procedures. Therefore, while the Audit Team reviewed project documentation to evaluate DOT&PF's NEPA process and procedures, the team did not evaluate DOT&PF's project-specific decisions to determine if they were, in FHWA's opinion, correct or not. The Audit Team reviewed NEPA documents from 41 projects including Programmatic CEs, CEs, EAs and Re-evaluations, a representative sample of all NEPA documents in process or initiated after the MOU's effective date. The Audit Team also interviewed environmental staff in all three DOT&PF regions as well as their headquarters office.

The PAIR consisted of 66 questions about specific elements in the MOU. The Audit Team appreciates the efforts of DOT&PF staff to meet the review schedule in supplying their response. These responses were used to develop specific follow-up questions for the on-site interviews with DOT&PF staff.

The Audit Team conducted 22 on-site and 6 phone interviews. Interviewees included staff from each of DOT&PF's three regional offices and DOT&PF headquarters. The Audit Team invited DOT&PF staff, middle management, and executive management to participate in interviews to ensure the interviews represented a diverse range of staff expertise, experience, and program responsibility.

Throughout the document reviews and interviews, the Audit Team verified information on the DOT&PF NEPA Assignment Program including DOT&PF policies, guidance, manuals, and reports. This included the NEPA QA/QC Plan, the NEPA Assignment Program Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team utilized information obtained during interviews and project file documentation reviews to consider the State's implementation of the assignment program through DOT&PF environmental manuals, procedures, and policy. This audit is a compliance review of DOT&PF's adherence to their own documented procedures in

compliance with the terms of the MOU. The team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

### **Overall Audit Opinion**

The Audit Team acknowledges DOT&PF's effort to establish written internal policies and procedures for the new responsibilities they have assumed. This report identifies one non-compliant observation that DOT&PF will need to address through corrective action. These non-compliance observations come from a review of DOT&PF procedures, project file documentation, and interview information. This report also identifies several notable observations and successful practices that we recommend be expanded. Overall, DOT&PF has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such the Audit Team finds that DOT&PF is substantially compliant with the provisions of the MOU.

### **Non-Compliance Observations**

Non-compliance observations are instances where the team found DOT&PF was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or DOT&PF's own procedures for compliance with the NEPA process. Such observations may also include instances where DOT&PF has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects DOT&PF to develop and implement corrective actions to address all non-compliance observations. The FHWA will conduct follow up reviews of non-compliance observations in Audit #2 from this review.

### **Observations and Successful Practices**

This section summarizes the Audit Team's observations of DOT&PF's NEPA Assignment Program implementation, including successful practices DOT&PF may want to continue or expand. Successful practices are positive results that FHWA would like to commend DOT&PF on developing. These may include ideas or concepts that DOT&PF has planned but not yet implemented. Observations are items the Audit Team would like to draw DOT&PF's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The DOT&PF may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared to be areas where DOT&PF could make improvements. This report addresses all six



MOU topic areas as separate discussions. Under each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for DOT&PF to begin implementing actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of Audit #2. The second Audit Report will include a summary discussion that describes progress since the last audit.

### **Program Management**

The review team acknowledges the DOT&PF's efforts to accommodate their environmental program to the 23 U.S.C. 327 responsibilities they have assumed. These efforts include updating their Environmental Procedures Manual, developing and implementing an expanded QA/QC Plan, establishing an Environmental Program Training Plan, and implementing a self-assessment process identifying deficiencies that were described and addressed in a report.

#### *Successful Practices*

The Audit Team found that DOT&PF has, overall, appropriately implemented its project-level review and compliance responsibility for CEs, EAs, and EISs. The DOT&PF has established a vision and direction for incorporating the NEPA Assignment Program into its overall project development process. This was clear in the DOT&PF's responses to FHWA's PAIR and in interviews with staff in the regions and at DOT&PF's headquarters office, commonly known as the Statewide Environmental Office (SEO).

The DOT&PF increased environmental staff in the SEO to support the new responsibilities under the NEPA Assignment Program. Staff at SEO are responsible for the review of some projects classified as CEs and all projects classified as EAs and EISs. Regional environmental staff coordinate their NEPA work through Regional Environmental Managers and NEPA Program Managers at SEO. Some staff responsibilities have changed under the NEPA Assignment Program, but positions have essentially remained unchanged. Following assumption of NEPA responsibilities, DOT&PF hired a statewide NEPA Assignment Program Manager who is responsible for overseeing DOT&PF's policies, manuals, guidance, and training under the NEPA Assignment Program.

The Audit Team would also like to recognize DOT&PF efforts to bring a lawyer into the early stages of project development to ensure a legally defensible document.

*Non-Compliance Observation #1: Opportunity of a public hearing*

Section 7.2.1 of the MOU requires the DOT&PF to develop procedures to implement the responsibilities assumed. This review identified one example of deficient adherence to these State procedures. This Audit Team identified one project file where DOT&PF did not offer the opportunity for a public hearing for the release of the Draft EA consistent with its own public involvement procedures in the January 2005 Preconstruction Manual Section 520.4.1 or the February 2018 Environmental Procedures Manual Section 4.4.2. The Audit Team confirmed with SEO that although public meetings were held, no opportunity for a public hearing was provided.

*Observation #1: Programmatic Section 106 compliance and Section 4(f) compliance*

The DOT&PF's November 2017 Section 106 Programmatic Agreement (PA) established an alternate procedure for Section 106 compliance in Alaska which allows the use of a streamlined process. The Audit Team identified a risk to DOT&PF in the application of their Section 106 PA to projects that require integrating the Section 106 process results to comply with the requirements of Section 4(f).

- a. The PA notes that the streamlined process is applicable to projects with low potential to affect historic properties. The DOT&PF staff characterized how they apply the streamlined Section 106 process to individual projects as ones that result in little or no potential to affect historic properties. The DOT&PF project documentation for the streamlined Section 106 compliance is a form that does not identify either a project effect or the effect to a specific historic property.
- b. Because the use of the streamlined form does not identify a Section 106 effect for any individual historic property, the DOT&PF documentation cannot support any required Section 4(f) de minimis impact determinations. (see 23 CFR 774.5(b)(1))

*Observation #2: Lack of a process to implement planning consistency at time of a NEPA decision*

Section 3.3.1 of the MOU requires DOT&PF to, at the time they make a NEPA approval (CE determination, finding of no significant impact, or record of decision) check to ensure that the project's design concept, scope, and funding is consistent with current planning documents. Reviews of project documents provided no evidence that DOT&PF staff had reviewed planning documents for availability of funding. Through interviews it was clear that their understanding of this requirement varied. Through reviews of DOT&PF manuals, the Audit Team could not find a procedure for staff to follow so that

at the time staff makes a NEPA approval, they are also checking (and documenting) that the project's design concept, scope, and funding is consistent with planning documents.

#### *Observation #3: Staff Capacity*

Sections 4.2.1 and 4.2.2 discuss the State's commitment of resources and adequate organizational and staff capability. Several DOT&PF staff explained through interviews, that since the State's entry into the full NEPA Assignment Program, their required review and documentation efforts dramatically increased. We learned from two region office staff that, because of the increased workload, the region office did not have sufficient resources to manage the workload associated with the NEPA Assignment Program. A related concern was the challenge in retaining qualified staff, possibly leading to a delay in project delivery. (MOU Section 4.2.1 and 4.2.2)

#### *Observation #4: Government-to-Government Consultation*

Section 3.2.3 of the MOU excludes assignment of the responsibility for Government-to-Government consultation with Tribes, to DOT&PF. The Audit Team learned through interviews, and a check of DOT&PF's environmental manual, that the DOT&PF has no written procedures on how its staff are to accommodate a Tribal request for Government-to-Government consultation with FHWA. Through interviews it was apparent that DOT&PF's staff has an inconsistent understanding of how to handle this scenario. Staff indicated they would like written guidance that addresses the process that includes FHWA's role. (MOU Section 3.2.3)

### **Documentation and Records Management**

The NEPA Assignment Program became effective on November 13, 2017. From that effective date through February 28, 2018, the DOT&PF made 56 project decisions. By employing both judgmental and random sampling methods, the Audit Team reviewed NEPA project documentation for 41 of these decisions.

#### *Successful Practices*

The Audit Team recognizes several efforts to improve consistency of filing project documentation learned through project documentation reviews and interviews. These include: the use of a standardized electronic folder structure developed by Central Region; a spreadsheet template used in Central Region to manage tasks and standardize filing of project documents; and Southcoast Region utilizing a document specialist to ensure that project files are complete.

The Audit Team would also like to commend DOT&PF's use of the optional 23 CFR 771.117(e) form for CE projects classified as c(26), c(27), or c(28) because it clearly and efficiently demonstrates that the conditions required for the project to be processed as a "c-list" CE have been met. We urge DOT&PF management to consider making this form a required part of CE documentation.

*Observation #5: Section 106 Compliance*

Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed, and Section 4.2.3 specifically calls out requirements pertaining to historic properties. This review identified two examples of deficient adherence to these Federal Section 106 compliance procedures. The regulations that implement Section 106 of the NHPA require the Agency Official to consider the impacts of their undertaking on historic properties and to afford the State Historic Preservation Officer (SHPO) an opportunity to comment. Through project file reviews, the Audit Team identified one instance where the Section 106 review did not consider the full extent of the project's undertaking. This was a project where an off-ramp bypass lane was added to the project but was not considered as part of Section 106 compliance. Note that this error was also discovered by DOT&PF during their self-assessment and corrective action has been completed. In the second instance, the review of project file documentation revealed that DOT&PF incorrectly made a decision that Section 106 compliance requirements to make an effect determination did not apply.

**Quality Assurance/Quality Control**

The Audit Team recognizes that the DOT&PF is in the early stages of the NEPA Assignment Program. However, the Audit Team made the following observations related to QA/QC.

*Successful Practices*

The MOU requires the DOT&PF to conduct an annual self-assessment of its QA/QC process and performance. The Audit Team found the DOT&PF's self-assessment report to be well-written and comprehensive with in-depth analyses. This documents their commitment to implementing a compliant NEPA Assignment Program.

The Audit Team would like to recognize the SEO's use of the QA/QC database for tracking QA/QC reviews. This allows them to quantify the review results to better identify trends or areas of concern that should be addressed.

The Audit Team learned through interviews that the Section 106 professionally qualified individuals in SEO review the information the regions submit to the SHPO. The SEO staff said that the records were adequate overall, but occasional follow up with individual regions was necessary to increase the clarity and address possible omissions. This SEO feedback should result in increased consistency and clarity in Section 106 documentation subject to interagency review.

*Observation #6: QC staff roles and responsibilities*

The DOT&PF's QA/QC plan identifies a Project Development Team who would review documents to ensure consistency, conciseness, and overall quality, but it does not discuss specific responsibilities of individual members for the QA/QC process. In addition, staff did not consistently articulate the QA/QC responsibilities of the Project Development Team members. The Audit Team would like to draw the DOT&PF's attention to what appears to be an inconsistent awareness of the use of Project Development Teams and the roles and responsibilities of team members for QC.

**Training Program**

Per MOU Section 12 Training, the DOT&PF committed to implementing training necessary to meet its environmental obligations assumed under the NEPA Assignment Program. As required in the MOU the DOT&PF also committed to assessing its need for training, developing a training plan, and updating the training plan on an annual basis in consultation with FHWA and other Federal Agencies as deemed appropriate.

The DOT&PF developed the 2018 Environmental Program Training Plan to fulfill the requirements of Section 12 of the MOU. The 2018 Environmental Program Training Plan is a comprehensive document that addresses a number of issues related to training including:

- a variety of in-person and virtual training methods that could be used by DOT&PF;
- the timing of, and approach to, updating the 2018 Environmental Program Training Plan;
- the development of an individual training plan (ITP) that outlines both mandatory and non-mandatory training;
- the training and experience the employees must acquire to be considered for promotion; and

- maintaining a record of trainings that were taken by employees in the last 3 years and their anticipated training requests for the upcoming year.

### *Successful Practices*

Tracking environmental training is required by the DOT&PF's 2018 Environmental Program Training Plan. One PD&E Chief shared a spreadsheet developed to track all the training taken by his staff, including environmental courses. The Audit Team believes this tool will help ensure employees received required training to advance the NEPA Assignment Program.

### *Observations:*

#### *Observation #7: Training Program*

MOU Sections 12.2, 4.2.2 and 4.2.3 require the DOT&PF to retain staff and the organizational capacity to implement their program and to implement training. Training often is an important tool for attaining and maintaining staff and organizational capacity. The Audit Team asked DOT&PF staff to share their perceptions about the training requirements in the plan; the adequacy of the training budget; and how training relates to their job responsibilities, performance, and employee development and promotion. The Audit Team urges the DOT&PF to consider ways to accommodate training needs and consider various approaches to deliver necessary training in a timely manner:

- a) Regarding training requirements, some interviewees said that the DOT&PF's training plan requirements were unrealistic because either: 1) staff was too busy working on projects to have the time to complete the training courses identified in the plan; or 2) given the turnover rates in their office and the frequency of training offered, employees were unlikely to get all required training during their tenure. The Audit Team considers the plan to be realistic and urges the DOT&PF to consider ways to address these challenges.
- b) Regarding the training budget, interview responses revealed no consensus. The DOT&PF management indicated a strong desire to have a robust NEPA program and some interviewees responded that they felt that the training budget was adequate. However, responses from other interviewees indicated that the training budget was inadequate, especially as it relates to travel. The Audit Team was unable to resolve whether the budget was inadequate and will consider this issue again in the next audit.

- c) The 2018 Environmental Program Training Plan links training to employee development and promotion. Interviews revealed: (1) inconsistent preparation and use of an ITP as is required for employees; (2) perceptions that training requirements for flexing from an Analyst 1 to Analyst 2 position are clearly spelled out, but not for advancement beyond an Analyst 2 position; (3) concerns that training opportunities are too limited or not available; and (4) some employees have not had a performance review in several years. Based on this input, the Audit Team suggests that the DOT&PF focus on additional ways to improve implementation of their Training Plan.
- d) Regarding training needs, DOT&PF staff indicated a need for Section 4(f) training, according to interviews in all three regions and SEO. Multiple interviewees also identified a need for training in noise and floodplains. Training needs cited at a lesser frequency included ESA, cumulative effects, Section 408, EA/EIS, QA/QC, Planning and Environmental Linkages, stream enhancement, NEPA, conflict resolution and mediation. Given that the DOT&PF is now implementing additional environmental review responsibilities based on the MOU, and staff recognize the need to be prepared to embrace those responsibilities, the Audit Team urges the DOT&PF to address these training needs expeditiously, and be sensitive to ongoing training needs.

### **Performance Measures**

The DOT&PF has demonstrated it has taken an active interest in developing, monitoring, and implementing the performance measures required by the MOU. The March 21, 2018, DOT&PF NEPA Assignment Self-Assessment Summary Report contained the results of the DOT&PF's first report of its assessment of NEPA Assignment and DOT&PF procedures compliance. The DOT&PF's March 1, 2017, response to FHWA's PAIR included answers to questions posed on performance measures. Because of the information provided in these two documents, combined with the fact that a relatively brief period of time has transpired since the MOU became effective, the Audit Team has not identified any observations or successful practices here. However, the following discussion describes the current status of the DOT&PF's performance measures.

The DOT&PF's performance measure to assess change in communication among the DOT&PF, Federal and State resource agencies, and the public resulting from assumption of responsibilities under this MOU was based on the experience of a single EA project, according to DOT&PF's self-assessment summary report. Through interviews, the Audit Team learned that the DOT&PF believes the resource agencies will observe little change

in communication and consultation because DOT&PF had been operating under a 23 U.S.C. 326 MOU since September 2009.

The DOT&PF's self-assessment summary report suggests some early efficiencies have been observed, but the consensus from interviews was that it is too early to determine if substantial increased efficiencies and timeliness will result from the program. Some individuals indicated that over time the program should result in increased efficiencies and timeliness.

Through interviews, the Audit Team learned that data for performance measures are being collected and presented quarterly to DOT&PF management for use in decisionmaking. Also, that DOT&PF believes the existing performance measures are comprehensive and adequate. The DOT&PF leadership said that performance measures will be evaluated annually to determine if adjustment is needed.

### **Legal Sufficiency**

Interviews with both staff and management attorneys emphasized the legal sufficiency review process emulated FHWA's "early legal involvement" concept, i.e., bringing a lawyer onto the reviewing team at an early stage in project development. We learned that DOT&PF staff do not need to go through management to talk to an attorney, but may call or email at any time (and, with regard to EAs, have done so under NEPA Assignment). Management noted specific review steps are to take place at the both draft and final stages for assigned EISs and Individual Section 4(f) Evaluations.

At this time, the Alaska Department of Law (DOL) expressed no intention of expanding the number of staff attorneys assigned to document review; however, it has a contingency plan should workload increase significantly in future. Specifically, should DOT&PF be sued over an assigned project, DOL tentatively intends to contract with outside counsel (per 23 U.S.C. 327[a][2][G]) to handle the litigation rather than make a single staff attorney divide his time between document review and defending the case. The Transportation Section attorney would act as support counsel to the litigators in a manner similar to the way FHWA counsel provide litigation support to the U.S. Department of Justice when it defends FHWA's environmental decisions in court. (MOU Section 6.1.1)

### **Next Steps**

The FHWA provided this draft audit report to DOT&PF for a 14-day review and comment period. The Audit Team considered DOT&PF comments in developing this



draft audit report. The FHWA will publish a notice in the Federal Register for a 30-day comment period in accordance with 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted to finalize this draft audit report pursuant to 23 U.S.C. 327(g)(B). The FHWA will publish the final audit report in the Federal Register.

[FR Doc. 2018-19184 Filed: 9/4/2018 8:45 am; Publication Date: 9/5/2018]